IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 23 of 1990

STATE & ORS.
V/S
NEMA & ORS.

Mr. HR SONI, A.G.A, for the appellant / petitioner

Mr. B.K.BHATNAGAR, for the respondent

Date of Order : 6.12.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

The matter comes up for hearing in due course. Before opening the argument, learned counsel for the respondents pointed out that some of the respondents have expired long back during pendency of the present appeal. Thereupon, learned counsel for the appellant submitted that since the suit was filed as a representative suit under O. 1 Rule 8 C.P.C., the death of some of the respondents does not effect the suit as the remaining respondents continue to represent. To this learned counsel for the respondent also has no objection. In view of the above, notwithstanding death the appeal was heard on merits.

This appeal has been filed by the State, against the judgment and decree of the learned District Judge, Sirohi dt. 13.9.1989, setting aside the judgment and decree of the learned Civil Judge, Sirohi dt. 2.11.1985, and thereby decreeing the plaintiff respondent's representative

suit, and granting the perpetual injunction, to the effect, that the agriculturists, and cattle breeder of village Naya Sanwara have a right to graze in Dabela Rajal Forest Area to the extent of 3540 cattle heads under the orders Ex.A-2 dt. 17.10.62, and have a right to have their cattle rest overnight in Goili Ki Bhagal existing in Khasra No. 3109, and in that no interference be caused by the defendants.

The case of the plaintiffs is that since times immemorial they have been grazing their cattle in Araji No. 3109, and those rights were recognised by the order dt. 17.10.68. It is then alleged that before demarcation of reserved forest land, the inhabitants of the village had been carrying their cattle to drink water at Sado Ka Bera @ Baba Ka Bera, and around that place the cattle used to rest overnight. The location and identity of that land has been shown in the site plan. It was then alleged that at the time of declaring the land as forest land, the land marked by figure “Kha”, “Ga”, “Gha”, “Cha”, “Chha” and “Ja” was excluded from forest area, and was reserved for resting cattle to come to graze in the forest, which area is known as Bhagali. Then the inhabitants are using the area for resting and watering their cattle. However, in 1975 obstruction was raised, therefore, the suit has been filed.

The defendants contested the suit denying the plaintiffs to have any customary right of easement, and pleaded, that the order is not dt. 17.10.68 but it is dt.

17.10.62, in File No. 42/62, wherein they were granted right of free grazing of 3540 cattle heads. Then, it was denied that the cattle are watered there, or are allowed to rest there. Regarding Goili Ki Bhagal, the plea taken was that in that Bhagal only the residents of Goili have a right to rest their cattle, and not the plaintiffs; and at that place the old houses of residents of Goili Ki Bhagal were existing and on their complaint the enclosures made by the residents of Naya Sanwara were removed. Interalia with these pleadings, the suit was prayed to be dismissed.

The learned trial court framed four issues. Issue no. 1 was about the plaintiff's right of easement, while issue no. 2 was about the plaintiff's right to get permanent injunction. Then, the third issue was regarding the defendant's claim of special cost under Section 35-A C.P.C., and fourth issue was about relief. The learned trial court found, that from Ex. 1 to 3 it is clear, that area of Goili Ki Bhagal is 79 ½ Bigha, while in Ex. 4 in Khasra No. 3109/2 is shown to be 111 ¾ Bigha. Then, Araji number also does not tally, inasmuch as, in Suit Araji number is shown 3109 while in Ex. 1 to 4 it is shown 3109/2. Then, it was considered that admittedly Baba Ka Bera is a forest land, and Goili Ki Bhagal is outside the forest area, and therefore, it was considered, that since according to the plaintiffs' witnesses, their cattle are rested at Baba Ka Bera, and therefore, they have failed to establish their right to rest the cattle at Goili Ki

Bhagal. Then, it was considered, that in Ex.A-1, Ex.A-2, and Ex.A-3, no right of resting cattle was given to residents of Naya Sanwara. Then, it was found, that these orders have been passed in 1962-63, while the suit has been filed in the year 1976 which is grossly belated, and negatives their right. Interalia with these findings the suit was dismissed.

In appeal the learned lower Appellate Court found that the learned trial court has not properly comprehended the facts, inasmuch as Araji Number 3109 falls in Dabela Rajal Forest Area which was demarcated in 1962. At that time the Bhagal was referred to as Goili Ki Bhagal, and was excluded from forest area which measured 79 ½ Bighas, as appears from A-1. Therein it was only mentioned as Bhagal, and not as Goili Ki Bhagal, but in the order Ex.A-3 it was referred to Goili Ki Bhagal, only by way of convenience, and D.W. 3 and D.W.4 had admitted that after the area was excluded from forest, the land was allotted fresh Araji Number, being 3109/2, and the measurement happened to alter because of change in the measurement of Bigha, and that in the orders Ex. 1 to 4 it has been found, that the plaintiffs have a right to rest their cattle overnight. It was also considered that site was inspected by the learned Munsiff, and as appears from the Site Inspection Note, that enclosures of the residents of Naya Sanwara were found there. Admittedly the residents of Naya Sanwara have right to graze their cattle in the forest area, free of cost.

Then, the judgments Ex. 1 to 4 have not been assailed further, and in the site plan Ex. A-4 and A-5 Goili Ki Bhagal has been shown adjacent to Baba Ka Bera. Then, D.W.5 has also admitted that for the last ten years, every year the residents of Naya Sanwara erect Jhumpa during rainy season, and keep their cattle there. Then, it was also found, that since Goili Ki Bhagal is under Revenue Department, Forest Authorities have no right to interfere, which aspect has not been considered by the learned trial court. It was also considered, that admittedly the residents of Naya Sanwara have the right to graze their cattle in Dabela Rajal Forest area, which is at a distance of 6 kms., and this results into the traveling of the cattle to the extent of 12 kms. a day, and if the cattle take rest in the Bhagal, it cannot be said that, that would cause any loss to the Forest Department or Revenue Department. Then, it was also found, that if the cattle graze, they can rest also, which is necessary. Interalia with these findings, the appeal was allowed, and the decree was passed as above.

This appeal was admitted by framing following substantial questions of law:-

> "1, Whether the learned District Judge, Sirohi could not decree the suit for want of compliance of the provisions of O. 1 Rule 8 C.P.C., as the suit was filed under these provisions?
>
> 2. Whether the learned District Judge was justified in

holding that the plaintiff respondents have acquired customary right of easement?”

Learned counsel for the appellant pressed both the questions. Arguing the second question it was submitted, that the plaintiffs have utterly failed to prove customary right of easement as pleaded, inasmuch as, easement could obviously be on some other person's definite land, and would be in favour of specified persons, and other instances of customary rights of easement have not been pleaded and proved.

On the other hand, learned counsel for the respondents supported the impugned judgment.

In my view, a look at the provisions of Rajasthan Forest Act, 1953 shows, that thereunder a notification is issued under Section 4, whenever it has been decided to constitute any land a reserved forest, the State Government is to issue a notification, and thereafter objections can be submitted within three months from the date of such proclamation by person claiming any right, to the Forest Settlement Officer, and according to Section 7 the Forest Settlement Officer is to enquire into all claims about existence of any right, and then under Section 11, in case of claim of rights of the categories mentioned therein the Forest Settlement Officer shall pass an order admitting or rejecting the same in whole or in part. Then, according to sub-section (2) of Section 11, if such claim is admitted in

whole or in part, the Forest Settlement Officer shall either exclude such land from the limits of the proposed forest, or enter into some arrangement, or can proceed to acquire such land in the manner provided by law. Then, according to Section 17 such order is appealable within a period of three months before the Forest Court. Then, according to Section 18(4) the order passed on the appeal by such officer or Court, or by the majority of the members of such Court, as the case may be, shall, subject only to revision by the State Government is final. It is in this background, that a look at Ex. A-1 shows, that thereby rights of inhabitants of Naya Sanwara regarding fodder, grazing, forest produce etc. were recognised in Dabela Rajal Forest Area. Then, in Ex.A-3 dt. 30.3.63, the order was passed by the Assistant Forest Settlement Officer pursuant to the proclamation, and having received objections, and in that process considered number of houses, family, occupation and cattle heads of village Naya Sanwara etc., and it was found, that there are five Bhagals which included Goili Ki Bhagal, and it was held, that the residents of the villages concerned shall be entitled to sit with their cattle, graze it, according to the prevalent practice, and the area of Bhagal has been earmarked, and pillars have been erected.

Thus, in my view, this order Ex.A-3 clearly recognises, and admits the rights of resting cattle in the Bhagal, and this order having not been assailed, has

acquired finality. In that view of the matter, when the right of resting the cattle has been recognised by the appellants, and that order of recognition survives so far, that by itself is sufficient to entitle the plaintiff to maintain the suit, and such right cannot be interfered with.

Learned counsel for the appellant submitted, that his apprehensions are, that in the garb of this order, the inhabitants of village Naya Sanwara may not erect enclosures or houses in the Bhagal, under the garb of resting their cattle. In my view, no such right has been recognised, whether by the impugned judgment, or in Ex.A-3, and even learned counsel for the respondents submits, that they do not claim any such right. Thus the apprehension of the learned counsel for the appellant is only apprehension having no substance.

In view of the above state of affairs, the appellants, who are the forest authorities, obviously have no right to interfere in the plaintiffs resting their cattle in the Bhagal. It is, however, clarified, that if there be any dispute between the inhabitants of other villages and the villagers of Naya Sanwara, that dispute may obviously be litigated out, as and when necessity arises. Thus the second question is required to be, and is accordingly answered against the appellant.

So far as the first question is concerned, admittedly notice has been published as required by O. 1 Rule 8 C.P.C., therefore, the first question is required to be, and is, answered against the appellant.

The net result of the above discussion is that the appeal is devoid of merit, and is dismissed, with the aforesaid observations, regarding absence of right of the plaintiff to raise any enclosures or encroachments. The parties shall bear their costs of this appeal.

(N P GUPTA),J.

/Sushil/